Filed 4/29/20 In re G.K. CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re G.K., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. G.K., Defendant and Appellant.	A156064 (Contra Costa County Super. Ct. No. J17-01084)

This is an appeal from judgment after the juvenile court found that 15-year-old defendant G.K. (minor) committed five sex crimes, including forcible rape and forcible oral copulation, against the 17-year-old victim outside a house party after a school homecoming dance. The juvenile court declared minor a ward of the court and committed him to the Division of Juvenile Justice for a maximum period of confinement of 21 years 4 months. On appeal, minor contends the juvenile court made factual findings unsupported by the record and erroneously denied his motion under Code of Civil Procedure section 170.6, subdivision (a)(1) to disqualify the judge for alleged bias. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On October 20, 2017, a juvenile wardship petition was filed pursuant to Welfare and Institutions Code section 602 alleging that minor committed the following crimes: kidnapping for sexual purposes (Pen. Code, § 209, subd. (b)(1))[1] (count one), forcible rape while acting in concert (§ 264.1) (count two), forcible oral copulation while acting in concert (§ 288a, subd. (d)) (counts three, four); forcible rape (§ 261, subd. (a)(2)) (count five); and forcible oral copulation (§ 288a, subd. (c)(2)) (count six). The petition further alleged that minor kidnapped the victim during the course of committing counts two, three and five (§ 667.61).

On June 21, 2018, minor moved to disqualify the judge assigned to his case, the Honorable Rebecca Hardie, arguing that she was not impartial and offering a verified declaration of counsel in support of the motion. Judge Hardie had previously overseen the hearing and disposition in the case of minor's co-responsible, N.C., who entered a no contest plea to forced oral copulation on April 30, 2018.

On June 28, 2018, Judge Hardie issued an order striking counsel's verified declaration and denying minor's motion for failure to state a legal basis for disqualification. Alternatively, she filed a verified answer. Minor did not seek review of this order by writ of mandate. (See Code Civ. Proc., § 170.3, subd. (d).)

On August 20, 2018, a contested hearing began. Several witnesses testified, including the victim, minor, and N.C.

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[1] Unless otherwise stated, all statutory citations herein are to the Penal Code.

A. The Prosecution Case.

1. The Incident.

On the evening of September 30, 2017, the victim attended a homecoming dance at a local high school and then rode in a car with several friends to a house party in Walnut Creek. The victim had consumed about "half of a water bottle filled with vodka." According to the victim, she felt "weak" and "intoxicated[.]" C.M., the victim's friend, testified that the victim also used C.M.'s "vape pen" containing THC "six or seven times, enough to get a person high[.]"

The victim was refused entry into the crowded house party, so she stayed outside where about 40 to 50 people were congregated. The victim saw her friend N.C. and gave him a hug. While the pair were talking, minor approached and called them over to a nearby bench. Because the victim was "drunk" and "stumbling around a little bit," minor and N.C. placed their arms around her waist and shoulder and "moved [her] body" to the bench. The victim testified that she felt like she was "forced" over to the bench and did not have the choice to refuse. The victim denied propositioning minor, N.C. or any of their other friends with sexual favors.

The victim next recalled that, while sitting on the bench, minor and N.C. were on the left side of her with their pants zippers down and their penises exposed. They tried to engage the victim in oral sex by placing their hands at the back of her head, but she refused. The victim turned away and said, " 'No,' " prompting N.C. to "grab[] me by the arm and put me on my knees" in front of the bench. Minor and N.C. then tried to insert their penises in the victim's mouth. The victim testified that she kept her mouth shut, explaining, "I didn't want to give them oral sex." The victim tried to throw herself face down on the ground, but N.C. "pulled me up on my knees

again," and he and minor tried to "make me give them oral sex again." As this went on, minor's penis actually touched the victim's mouth area and teeth.

The victim told the boys she wanted to go back to the party to see Christian, her off- and on-again boyfriend, who was inside. However, rather than complying, minor and N.C. guided the victim toward minor's car by again placing their hands on her waist and shoulder to move her body. She testified that she told them she did not want to go. Once at the car, minor opened the rear door on the driver's side and moved across to the rear passenger side. N.C. then placed the victim in the middle area of the rear seat before seating himself next to her. He then closed the door. Once again the victim found N.C.'s zipper down and penis exposed. N.C. pushed the victim's head toward his penis, and when she opened her mouth to say no, his penis entered her mouth.

A short while later N.C. left the car, closing the door behind him. According to the victim, minor then "pulled down my leggings" and "stuck his penis inside of me," despite the fact she told him, " 'No. Please stop,' " multiple times. The intercourse lasted two or three minutes, during which the victim did not feel as if she could get away because she was "frozen" and minor was holding her waist. The victim's head hit the car ceiling every time he penetrated her.

About one minute into intercourse, the victim began recording the encounter on her cell phone. At that point, the victim had already told minor to stop "[m]ore than ten times." In this recording, played for the court, the victim can be heard repeatedly telling minor "no" for about 10 seconds.

According to the victim, she asked him if he had "finished" because she was concerned about getting pregnant; minor said he had not. Minor then

"kind of pushed [the victim] off of him and then got out through the right side . . . car door and pulled his pants up." Feeling "shocked," the victim pulled up her leggings and returned to the party, where she went inside and told no one what had happened.

2. The Disclosure.

The following Monday, the victim told her friend K.H. she was "assaulted by two people" at the post-homecoming party. According to K.H., the victim appeared "nervous" and "sad" about this news.

On October 2, 2017, the victim went to her school's counselor, S.A., and told her she "had come in to talk" about "an assault" that had happened to her "friend." S.A. described the victim as "distressed" and "worried." The victim returned to S.A.'s office on October 17 to discuss the incident again, and this time, the victim went from "speaking in the third person about someone else to slipping up and using an 'I' instead of a 'she.' " After the victim acknowledged being sexually assaulted, S.A. informed the school principal and contacted law enforcement.

During their discussion, the victim told S.A. that her former boyfriend, Christian, had heard that she " 'had sex' " with minor and N.C. and that she wanted Christian to know it was not consensual. The victim herself had not told Christian about the incident because she was "embarrassed" that she "couldn't have done more to stop" it. According to the victim, after she disclosed this incident to S.A., "people looked at [her] way different" and she "lost a lot of friends." Later in the year, she attended a party at which people were calling her a "liar" and saying to "stay away from" her.

3. The Investigation.

After S.A. disclosed the victim's rape, Detective Thomas Norvell met with the victim and arranged for her to make recorded pretext phone calls to

minor and N.C. Norvell advised the victim to avoid accusing minor of rape because, in his experience, this term could make the suspect defensive or unresponsive. He also suggested that the victim feign concern about being pregnant so that minor would admit having sexual intercourse with her, and that she should tell him "maybe at first things were okay" during their encounter but she then "said no, and that's when things should have stopped. [¶] So things were consensual up to a point." Norvell acknowledged his suggestions were "purely for purposes of the pretext call" and were not necessarily based on his "understanding of what had happened."

During the recorded pretext call with minor, which was played for the court, minor repeatedly stated that the victim had said both "yes" and "no" during the incident, insisting, "I said, 'Do you want to stop?' and you said, 'No, keep going.' " Minor acknowledged that he had physically held her up, claiming he had to do so because she was so intoxicated. Minor also expressed doubt that the victim could be pregnant since he did not ejaculate but nonetheless offered to accompany her to a doctor to address her concerns. The victim was "nervous" throughout the call and "cried" when it ended. Afterward, she placed another call to minor so that law enforcement could determine his location in order to detain him.

On October 18, 2017, Detective Nelly Morris and another detective interviewed N.C., who was initially "very evasive, denying a lot of things," and insisting the victim "wanted to have sex with [minor.]" Although describing the victim's level of intoxication as "a solid 10," N.C. did not believe minor had acted inappropriately. He explained that " 'it's hard and confusing when someone's saying no and yes.' " As the interview continued, N.C. began crying and ultimately acknowledged that at some point in the evening the victim "was on her knees" near the bench and that both his and

minor's penises were "at a certain point" exposed. Once they moved to the car, N.C. saw minor "pull [the victim] on to [his] lap," "pull [her] pants down," and "pull his . . . penis out[.]" N.C. heard the victim say, " 'No, no, I want to leave.' " N.C. believed "what [minor] did was wrong"; "he should have listened to [the victim]" "[w]hen she said 'No'[.]" N.C. offered to write the victim a "heartfelt" apology letter, which he did without any assistance from the detectives.

B. The Defense Case.

1. Minor's Testimony.

Minor testified that he and the victim had been texting and communicating on social media for "about two weeks" before homecoming. After attending the dance, minor and a few friends, including N.C., K.R. and K.W., drank cognac before going to a house party. He did not think he was drunk.

Minor and his friends could not get into the party and were hanging around outside when the victim approached and gave N.C. a hug. Minor testified that the victim told the boys they were "cute" and that she "wanted to [expletive] all of [them]." As the victim said these things, she rubbed minor's chest "in a sexual way." She did not seem intoxicated to minor.

K.R. and K.W. decided to try again to enter the party, while minor, N.C. and the victim walked to a nearby bench and sat down. The victim, seated in the middle, began "rubbing" both boys' penises through their pants and told them they "had big penises and . . . she wanted to have sex with [them]." According to minor, he attempted to convince N.C. and the victim to go to the car, as he did not want to have sex on the bench. He denied either boy exposed his penis or made "any attempt at oral sex" on the bench. The victim initially "just looked at" them without responding, then declined to go

to the car. However, she then "said, no, wait," and walked on her own to the car without any physical assistance from minor. Eventually, minor entered the back seat on the driver's side and moved to the rear passenger side. The victim followed him to the rear middle seat. N.C. then sat beside the victim in the rear seat on the driver's side.

Initially, the victim expressed her desire to leave the car, but after N.C. "gestured for her to, like, go," she "just stayed there." Telling the boys "Christian can't find out that I'm with you guys," the victim then mounted minor's lap while "simultaneously" bending over to "give [N.C.] oral sex." This oral sex lasted about "one to two minutes" while minor was "on [his] phone" "trying not to watch[.]" Afterward, N.C. left the car and the victim started "pulling her pants down" and "fiddling with [minor's] zipper" in order to "take [his] penis out." Minor placed on a condom and helped the victim pull down her pants. The victim then grabbed his erect penis and placed it inside of her, and the two began intercourse. According to minor, he was "kind of sitting there" and "holding [the victim's] waist," while the victim "was bouncing up and down" and kept telling him "no, no, yes, yes." When minor asked her if he should stop, the victim replied "no." The victim moaned throughout their two to three minutes of intercourse.

At one point during intercourse, the victim stopped and told minor she had seen Christian's brother and his friends. She also told minor text messages from Christian were "blowing up her phone . . . ." After Christian's friends passed by the car, the victim restarted the intercourse. Thirty seconds later, however, she stopped again, telling minor, "Christian can't find out." Seconds later, minor stopped the intercourse for good. Minor moved the victim off of his lap and removed the condom. The victim left the car, asking minor why he had stopped. Minor told her, "[Y]ou kept saying no and

yes and you say you didn't want Christian to find out." The victim asked minor if he had ejaculated, and when he responded no, she asked, "[W]hy, wasn't I good enough[?]" Both returned to the party and did not speak again that evening.

Over a week after the incident, minor approached the victim at school after hearing from a friend that she had said he and N.C. raped her. Minor had heard the recording from the victim's phone in which she can be heard telling him "no, please stop." When he confronted her, the victim denied telling anyone that he had raped her. Minor later speculated that the victim made this recording when, during intercourse, she had seen Christian's friends and had briefly stopped having sex.

Minor confronted the victim two other times about her rape accusations. The first time he confronted her at school and the second time during the phone call that ultimately led to his arrest. Both times, he confronted her about why she was telling people that he had raped her.

Minor continued to maintain during his direct examination that he did not rape the victim; he had consensual sex with her. On cross-examination, however, several inconsistencies appeared in minor's testimony. First, minor acknowledged that in the recording the victim made with her phone, she can be heard telling him "no" for "ten seconds" although he insisted that she said "yes after that video." Minor admitted telling police during the investigation that the victim appeared intoxicated. He also admitted seeing N.C.'s penis in the victim's mouth, although he previously denied actually seeing any oral sex (he just assumed it had taken place). Additionally, minor stated on direct examination that he had expressed his desire to move from the bench to the car to have sex with the victim. However, on cross-examination he testified

that he left the bench to go to the car to get his hat and did not know at that time what the victim was thinking about.

2. N.C.'s Testimony.

N.C. testified that the victim walked up to him outside the homecoming afterparty and said that she wanted to have sex with him and his friends. The boys did not take the victim seriously and walked away. About 10 minutes later, however, N.C. saw the victim talking to minor on a bench outside the party in a nonsexual manner. N.C. decided to return to the party but then walked back to the bench about 45 minutes after failing to gain entry. Minor and the victim were still there talking, so N.C., wanting to get his jacket from the car, went to find the car keys.

At the car, N.C. unlocked the door and then went around to the back to urinate. When he finished, he opened the rear passenger side door and saw minor and the victim inside. After minor pulled the door shut, N.C. went around to the rear driver side door and opened it. He saw the victim in the rear seat "tr[ying] to get on [minor's] lap." N.C. could not find his jacket and turned to leave, at which point he heard the victim say, " 'I want to [expletive] you. I don't want Christian to find out.' " He did not actually see the victim and minor having sex.

When asked about the inconsistencies between his statements to the detectives and his testimony at the hearing, N.C. stated that he felt "pressured" by the detectives to say that he and minor had "forced sex" on the victim. N.C. denied engaging in any sexual activity with the victim and denied knowing whether minor had forced her into sexual activity.

N.C. admitted pleading no contest to "conduct related to th[e] night" in question and admitted writing the victim an apology letter in which he acknowledged what had happened that night was "disrespectful" and

"inappropriate." According to N.C., the detectives failed to "explain to him what they were investigating" or "what they thought [he] had done," although he was "guessing" when they interviewed him "that [the victim] had accused [him] of sexual assault[.]"

C. The Juvenile Court's Findings and Order.

On September 11, 2018, the juvenile court found not true that minor committed count one, kidnapping for sexual purposes, and dismissed the remaining kidnapping allegations. The court found true that minor committed the remaining five counts for forcible rape in concert (count two), forcible oral copulation in concert (counts three, four), forcible rape (count five), and forcible oral copulation (count six). In making these findings, the court expressly found that the testimony of the victim and C.M. was credible but that the testimony of minor and N.C. was self-serving, implausible and untrustworthy.

On November 15, 2018, the juvenile court declared minor a ward of the court and committed him to the Department of Juvenile Justice for a maximum term of confinement of 21 years 4 months, with credit for 395 days in custody. This timely appeal followed.

DISCUSSION

Minor raises two primary arguments on appeal: (1) there was no substantial evidence in the record proving that he acted with "force" against the victim, or that their sexual encounter was nonconsensual; and (2) the juvenile court erroneously denied his motion for disqualification under Code of Civil Procedure section 170.6 after concluding the verified declaration he submitted in support of the motion failed to state a legal basis for relief. We address each argument in turn.

I. Substantial Evidence Supporting Counts Two–Six.

"The same standard governs review of the sufficiency of the evidence in adult criminal cases and juvenile cases . . . ." (*In re Matthew A.* (2008) 165 Cal.App.4th 537, 540.) "In reviewing a criminal conviction challenged as lacking evidentiary support, ' "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." ' [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 396.) "If the circumstances reasonably justify the juvenile court's finding, we cannot reverse merely because the circumstances also might support a contrary finding. [Citation.] This rule applies equally to express and implied findings. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [citations] [all presumptions are indulged to support the judgment regarding matters as to which the record is silent].)" (*In re Manuel G.* (1997) 16 Cal.4th 805, 823.)

A. Force.

Counts two through six each required proof that minor accomplished the sexual offense through use of force. (§§ 264.1 (count two), 288a, subd. (d) (counts three, four), 261, subd. (a)(2) (count five), 288a, subd. (c)(2) (count six).) "Force" in these circumstances means "sexual penetration *accomplished against the victim's will* by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury. As reflected in the surveyed case law, in a forcible rape prosecution the jury determines whether the use of force served to overcome the will of the victim to thwart or resist the attack, *not* whether the use of such force physically facilitated sexual penetration or prevented the victim from physically resisting her attacker."

(*People v. Griffin* (2004) 33 Cal.4th 1015, 1027; see *id.* at p. 1023 [rejecting a definition of force that was " '*substantially* different from or *substantially* greater than' the physical force normally inherent in an act of consensual sexual intercourse"]; see also *People v. Guido* (2005) 125 Cal.App.4th 566, 576 ["As with forcible rape, the gravamen of the crime of forcible oral copulation is a sexual act accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury. As with forcible rape, it is only when one participant in the act uses force to commit the act against the other person's will that an otherwise lawful act becomes unlawful"].)

Moreover, "[the victim's] active participation in the encounter does not exclude her from the protection of our forcible rape statute." (*In re Jose P.* (2005) 131 Cal.App.4th 110, 117.) Rather, what matters for purposes of the forcible rape or forcible oral copulation statute is whether the perpetrator has violated " ' "the integrity of a woman's will and the privacy of her sexuality from an act of intercourse undertaken without her consent," ' " not whether the perpetrator has undertaken an act of physical force of sufficient degree to cause the woman physical harm. (*People v. Dearborne* (2019) 34 Cal.App.5th 250, 258, citing *People v. Griffin*, *supra*, 33 Cal.4th at p. 1025; see *People v. Guido*, *supra*, 125 Cal.App.4th at p. 576.)

Accordingly, the issue for the juvenile court in this case was "simply whether [minor] used force to accomplish intercourse with [the victim] against her will, not whether the force he used overcame [the victim's] physical strength or ability to resist him." (*People v. Griffin*, *supra*, 33 Cal.4th at p. 1028.) Here, this standard was met. The victim testified that while she was "drunk" and "stumbling around," minor and N.C. placed their arms around her waist and shoulder and "moved [her] body" to an outside

bench where they repeatedly tried to get her to engage in oral sex by exposing their penises and placing them in her mouth area—despite her protestations and attempts to keep her mouth closed.

In addition, the victim testified that minor and N.C. similarly forced her to walk to minor's car, again by placing their hands on her shoulder and waist and moving her body even though she told them she did not want to go. N.C. then placed the victim in the middle seat, sandwiched between himself and minor. After N.C. again forced the victim into oral sex by pushing her head toward his penis and then left the car, minor "pulled down [the victim's] leggings" and "stuck his penis inside of [the victim]" despite her repeated protestations of " 'No. Please stop.' " As minor admitted at the hearing, the victim's contemporaneous recording of the incident corroborates her testimony that she repeatedly told him "no." And further corroborating the victim's testimony, N.C. told the detectives that he saw minor "pull [the victim] on to [his] lap," "pull [the victim's] pants down," and "pull his . . . penis out[.]"

This evidence no doubt suffices to prove that minor, without the victim's consent, forcibly moved her body against her will, first, to the bench and, next, to the car, where in both instances he sexually penetrated her despite her protestations. (See *People v. Griffin*, *supra*, 33 Cal.4th at p. 1027; *In re Jose P.*, *supra*, 131 Cal.App.4th at p. 117 [concluding the evidence of force was sufficient even though the victim participated in the sexual encounter because she "made it clear to appellant, repeatedly and prior to penetration, both that she did not want to be penetrated and that appellant's efforts were both against her will and physically painful to her"].) It is well established that testimony from a single witness, such as the victim, that is not inherently implausible or physically impossible constitutes substantial

evidence in support of the court's findings. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Here, we have this testimony and more.

Notwithstanding this showing, minor theorizes that the victim's credibility and motives are suspect, suggesting that she fabricated the nonconsensual nature of his acts after hearing that her former boyfriend, Christian, was angry about her sexual activity with the two minors. Minor argues the evidence proved the victim was the instigator of their sexual activity and a willing participant. Minor also labels the juvenile court's factual findings as "internally inconsistent . . . ." He insists the court "could [not] have found that the victim was credible *and* that there was not sufficient evidence of the kidnapping charge or allegation." We reject these arguments.

As an initial matter, it is well established that " '[i]nconsistency in a verdict is not a sufficient reason for setting it aside.' " (*People v. Palmer* (2001) 24 Cal.4th 856, 860; see § 954 ["acquittal of one or more counts shall not be deemed an acquittal of any other count"].) It is especially true in this case where substantial evidence disproves minor's theory. For one, the recorded pretext phone call undercuts minor's testimony that the victim instigated intercourse by mounting his lap and "bouncing up and down" while he was "kind of sitting there." Minor can be heard during this call telling the victim, "I said, 'Do you want to stop?' and you said, 'No, keep going.' " Minor also acknowledged physically holding her up, insisting he had to do so because she was so intoxicated.

In any event, we need not fully address minor's theories or evidence. The law is quite clear that our role on appeal is limited to determining whether there is *any* substantial evidence in the record that supports the

court's findings; it is not to determine whether alternative plausible scenarios exist. (See *In re Manuel G.*, *supra*, 16 Cal.4th at pp. 822–823.)

Thus, even assuming for the sake of argument that minor's evidence reasonably supports the theory that the victim lied about his commission of these crimes to protect her relationship with Christian, the issue before us is whether the evidence relied upon by the juvenile court reasonably supports the contrary theory that these crimes in fact occurred. (*In re Manuel G.*, *supra*, 16 Cal.4th at p. 823.) " '[A]ppellants often mistakenly assume that, if the evidence against the judgment greatly preponderates, a reversal is proper because of the absence of a *substantial conflict*. [¶] The test, however, is not whether there is substantial conflict, but rather whether there is *substantial evidence in favor of the respondent*. If this "substantial" evidence is present, no matter how slight it may appear in comparison with the contradictory evidence, the judgment will be affirmed . . . .' " (*In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497.) We conclude there is such evidence.

Accordingly, for the reasons stated, we affirm the juvenile court's findings that minor forcibly raped and forcibly engaged in oral copulation with the victim. We therefore uphold the court's order sustaining the allegations with respect to counts two through six.

II. Denial of Minor's Motion for Recusal.

Minor next contends the juvenile court erroneously denied his motion for disqualification under Code of Civil Procedure section 170.6 after concluding the verified declaration he submitted in support of the motion failed to state a legal basis for relief. Relevant here, a judge may be subject to disqualification where a "person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." (Code Civ.

Proc., § 170.1, subd. (a)(6)(A)(iii).) Having reviewed the record, we reject minor's challenge on procedural and substantive grounds.

First, we agree with the People that minor's challenge is not cognizable on appeal because he did not comply with the requirement under Code of Civil Procedure section 170.3, subdivision (d) to seek timely review of the court's disqualification order by petition for writ of mandate. (*Brown v. American Bicycle Group, LLC* (2014) 224 Cal.App.4th 665, 672.)[2]

As the California Supreme Court instructs: " 'If a judge refuses or fails to disqualify herself, a party may seek the judge's disqualification. The party must do so, however, "at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification." (Code Civ. Proc., § 170.3, subd. (c)(1).)' (*People v. Scott* (1997) 15 Cal.4th 1188, 1207 [citations].) As was the case in *Scott*, defense counsel was fully aware before and during trial of all the facts defendant now cites in support of his claim of judicial bias. But he never claimed during trial that the judge should recuse himself or that his constitutional rights were violated because of judicial bias. 'It is too late to raise the issue for the first time on appeal.' (*Ibid.*; see also *People v. Brown* (1993) 6 Cal.4th 322, 334 [citations] ['[Code of Civil Procedure s]ection 170.3[, subdivision] (d) forecloses appeal of a claim that a statutory motion for disqualification authorized by section 170.1 was erroneously denied'].)" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1111, overruled in part on another ground in *People v. Rundle* (2008) 48 Cal.4th 76,

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[2] Subdivision (d) of Code of Civil Procedure section 170.3 provides in relevant part: "The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought only by the parties to the proceeding. The petition for the writ shall be filed and served within 10 days after service of written notice of entry of the court's order determining the question of disqualification."

151; see *People v. Barrera* (1999) 70 Cal.App.4th 541, 552 ["parties who were aware of the basis for disqualification and chose to waive it are bound by the requirements governing review set forth in subdivision (d) of [Code of Civil Procedure] section 170.3. Absent a timely petition for a writ, the issue is not reviewable"].)

The same is true in this case. Minor was aware of the facts alleged in support of his motion for disqualification *before* his contested jurisdictional and disposition hearings. Yet he never filed a petition for writ of mandate as required by Code of Civil Procedure section 170.3, subdivision (d). Instead, minor waited until this appeal to challenge the juvenile court's refusal to recuse herself. Accordingly, under the authority set forth, his challenge has been forfeited.

Minor attempts to avoid this procedural bar by labeling his bias claim against the judge as implicating his constitutional due process rights. Even assuming under certain circumstances a defendant may demonstrate constitutional grounds for waiting until an appeal to challenge a judge's disqualification order notwithstanding section 170.3, subdivision (d) (see *People v. Peoples* (2016) 62 Cal.4th 718, 787), minor has provided no such grounds here.

Minor is correct that defendants have a "due process right to an impartial trial judge under the state and federal Constitutions. [Citations.] The due process clause of the Fourteenth Amendment requires a fair trial in a fair tribunal before a judge with no actual bias against the defendant or interest in the outcome of the case." (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1111.) Here, minor contends Judge Hardie's lack of impartiality was demonstrated by remarks she "reportedly" made during N.C.'s disposition hearing relating to minor's conduct in this incident and by the judge's

numerous adverse rulings at minor's jurisdictional hearing (none of which, we note, he has appealed). It is well established, however that "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." (*Liteky v. United States* (1994) 510 U.S. 540, 555.) In addition, "a trial court's numerous rulings against a party—even when erroneous—do not establish a charge of judicial bias, especially when they are subject to review." (*People v. Guerra*, *supra*, at p. 1112.)

Based on this authority, we uphold the court's finding that minor failed to state a legal basis for her disqualification. First, minor has failed to offer any reporter's transcript to verify that the judge actually made the remarks of which he complains. In any event, however, the remarks appear to be nothing more than the judge's opinions on the basis of facts introduced at N.C.'s hearing or legitimate evidentiary rulings at minor's hearing that did not go his way. (See *Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 795–796; see *People v. Perez* (2018) 4 Cal.5th 421, 441 ["a trial judge may hear a case even if he or she has expressed an adverse impression of a party that was 'based upon actual observance of the witnesses and the evidence given during the trial of an action' "].) Moreover, as in *People v. Guerra*, "[minor's] willingness to let the entire [hearing] pass without another charge of bias against the judge not only forfeits his claims on appeal but also

strongly suggests they are without merit." (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1112.)

The court's order therefore stands. (See *People v. Pearson* (2013) 56 Cal.4th 393, 447 [the role of the appellate court is simply to " 'assess whether any judicial misconduct or bias was so prejudicial that it deprived defendant of " 'a fair, as opposed to a perfect, trial' " ' "].)

DISPOSITION

The judgment is affirmed.

Jackson, J.

WE CONCUR:

Siggins, P. J.

Petrou, J.

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